CVN Companies, Inc. *and* Mavis L. Dorff. Case 18–CA–10895–2

February 19, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On October 23, 1990, Administrative Law Judge Robert T. Wallace issuedthe attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions[3] and to adopt the judge's recommended Order, as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, CVN Companies, Inc., Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following as paragraph 1(d).

''(d) Monitoring or engaging in surveillance of union activities of employees.''

2. Insert the following as paragraph 1(f) and reletter the subsequent paragraphs accordingly.

''(f) Threatening employees with discharge because of their union activity.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate you concerning your or other employees' union activities or sympathies.

WE WILL NOT prohibit you from discussing unionization during nonwork times.

WE WILL NOT interfere with employee distribution of union literature in nonwork areas.

WE WILL NOT monitor or engage in surveillance of your union activities.

WE WILL NOT promise or offer benefits in return for your ceasing to voice support for unionization.

WE WILL NOT impose discriminatory sign-out requirements for the purpose of preventing you from engaging in union or other protected activities.

WE WILL NOT threaten you with discharge because of your union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

CVN COMPANIES, INC.

A. Marie Simpson, Esq., for the General Counsel.
Douglas R. Sullenberger and *Joseph W. Bryan, Esqs. (Fisher & Phillips)*, of Atlanta, Georgia, for the Respondent.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In early January, employee Mavis Dorff was seated at a lunchroom table discussing the Union with six other employees. Telemarketing Manager James Gaboury sat down next to her and stated, ''This ought to be interesting because the Union lady is going to talk.'' The judge found that by this conduct the Respondent created the impression of monitoring or surveillance in violation of Sec. 8(a)(1). We agree that the conduct violated Sec. 8(a)(1) but find it was actual monitoring or, as alleged in the complaint, surveillance of union activity. Thus, Gaboury, by his actions and words, indicated his intention to observe at close range Dorff's union activity, i.e., to actually monitor her union activity. See, e.g., *Hawthorn Co.*, 166 NLRB 251 (1967), enfd. in pertinent part 404 F.2d 1205 (8th Cir. 1969) (foreman who joined employees at cafeteria tables, where this was not prior practice, inhibited the use of breaks for Sec. 7 activity, and thereby engaged in unlawful surveillance); and *Whiting Corp.*, 188 NLRB 500, 505 (1971) (unlawful surveillance for supervisor to approach prounion employee to discuss union in full view of other employees).

[3] The Respondent urges that there is no evidence in the record to support the judge's finding that leadman Quentin Kelly is an admitted supervisor. However, in its answer to the complaint, the Respondent admitted that Kelly is a statutory supervisor.

[4] We correct the judge's inadvertent omission in his recommended Order and notice that the Respondent cease and desist from threatening its employees with discharge because of their union activities.

The Respondent has filed a motion to reopen the record, claiming that on October 13, 1989, QVC Network, Inc. purchased all its stock, and because of this and other operational changes a new entity has been created. The Respondent argues that this new entity is not a successor. Further, the Respondent argues that even if the new entity is a successor it should not be subject to a cease-and-desist order, nor should it be required to post a cease-and-desist notice for unfair labor practices it did not commit. Because these contentions raise compliance issues, we deny the Respondent's motion and leave this matter to that stage of the proceeding.

DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge. This case was tried in Minneapolis, Minnesota, on August 17 and 18, 1989. The charge was filed May 19, 1989, and the complaint issued on June 30. At issue is whether Respondent CVN through threats, interrogations, and discrimination violated rights guaranteed an employee (Dorff) under Section 7 of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT AND ANALYSIS

I. VIOLATIONS OF SECTION 8(A)(1)

CVN, a corporation, sells merchandise via mail order and cable television at its facility in Minneapolis, Minnesota, where it annually ships to points outside the State of Minnesota goods valued in excess of $50,000. It admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

In early December 1988, Dorff attended two meetings conducted by a representative of the Teamsters Union; and during the course of those meetings she agreed to help organize employees of CVN. However, she refrained from doing so overtly until on or about January 3[1] when she appeared at work wearing several union buttons on each side of her lapels and began to distribute union literature during workbreaks in the company cafeteria; and she continued to wear the buttons and to engage in organizational activities daily until she went on extended medical leave on February 10.

A short time after January 3 a supervisor (Telemarketing Manager James Gaboury) approached Dorff at her workstation and asked her to accompany him to a small office on the sales floor. There, with no one else present, he asked her: ''What is all this talk about the union?'' and what is your involvement in it?.'' When she told him she supported the Union, he asked if that was because of the recent (November 30) firing of her daughter. After she answered ''no,'' he said he'd appreciate her not talking about the Union any more.[2] The latter comment though couched in the form of a request constitutes an unlawful interference with her right as an employee to assist in forming a labor organization. In effect, he was telling her that she risked his displeasure if she continued to voice support for the union anywhere in the facility. *Fiber Glass Systems*, 278 NLRB 1255 (1986). And in light of that admonition his questions regarding the union campaign and her involvement in it were not isolated, innocuous, and casual within the rationale of *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Instead, they constituted coercive interrogation. *Offshore Shipbuilding*, 274 NLRB 539 (1985).

As noted, Dorff aided the organizing effort by distributing union literature in the company cafeteria. On at least three occasions in January, Gaboury followed her as she placed flyers on tables and immediately retrieved and discarded them; and in one instance he picked up flyers being read by employees. Gaboury states that he regarded the material as ''debris'' and that he removed and discarded it in the course of his daily routine of picking up any ''miscellaneous garbage'' laying on the tables. Under the Act employees are entitled to engage in organizational activities, including distribution of literature, while off duty in nonworking areas such as lunchrooms. By viewing the flyers as no different than garbage and immediately removing them from the tables, Gaboury unlawfully interfered with that right through confiscation. *Mississippi Chemical Corp.*, 280 NLRB 413, 419–420 (1986).

On another occasion in January, Dorff was seated in the cafeteria discussing the Union with at least six other employees when Gaboury and another supervisor (Gunnar Johnson) approached their table. Gaboury sat next to Dorff stating: ''This ought to be interesting because the union lady is going to talk.'' At that point another employee at the table (Patty Soncrant), who had been an early supporter of the Union, began to talk against it. Surprised, Dorff interrupted stating: ''Patty! What are you saying?'' To which Soncrant replied: ''A person has a right to change their mind if they want.'' Dorff then got up and left the area.[3] For the next few minutes Gaboury answered questions concerning the Union and then everyone went back to work. I find Gaboury's uninvited intrusion into what he correctly perceived as prounion proselytizing by Dorff was a patent attempt to inhibit her as well as other employees in the exercise of Section 7 rights by creating the impression of monitoring or surveillance. *Peck, Inc.*, 269 NLRB 451, 459 (1984).

On January 9, Gaboury approached Dorff at her work station and told her to report to Robert Sanders, CVN's director of human services. When she entered his office downstairs in the executive suite, he asked about the union drive. She told him what her involvement had been. He appeared ''not too pleased with all that,'' and told her he did not want her to continue talking about the Union. Dorff responded that she felt very strongly about the Union and would continue to promote it. After a pause, he said he would like to talk about

[1] A letter notifying CVN of the Union's intent to organize the Company was sent on December 19.

[2] Although Gaboury denies ever questioning any employee about the Union or ever telling Dorff or any other employee not to talk about the Union, I find candid and credit Dorff's account. I note that Gaboury did not deny initiating and participating in the one-on-one meeting with Dorff. And my impression of his overall credibility was not enhanced when in answer to the question whether he ever saw Dorff wearing a number of union buttons he replied: ''I recall vaguely her wearing one button . . . but it wasn't—it was probably the size of a quarter.'' Another manager (Shirley Theide), who, unlike Gaboury, had no supervisory responsibility over Dorff, had no difficulty in stating that she had seen her wearing a number of union buttons.

[3] Gaboury and Johnson both claim that they went over to the table at the invitation of Soncrant and they deny that Gaboury made the opening remark attributed to him by Dorff. In denying that anyone asked them to come over to the table, Dorff remained firm when asked whether testimony to that effect by an employee witness would be incorrect; and I have credited her account. In that regard, I note that neither Soncrant nor any other employee at the table was called as a witness to corroborate the claimed invitation. Also I note that Gaboury and Johnson did not deny positioning themselves next to known union advocate Dorff; and I find it hard to believe Johnson's testimony that he could not recall what was said at the table and that he was not sure that Dorff was there.

her daughter Vicky's termination in November, adding that he had set up an appointment to see Vicky on the following day. Dorff declined stating that she had other reasons for supporting the Union and that the firing was not her principle concern. Sanders then asked if she would like to be transferred to a day shift. After replying that she preferred her present schedule, she inquired: ''Why do you ask?'' ''Because then you wouldn't have to deal with Mr. Gaboury,'' he answered. Dorff responded that she had no problem dealing with Gaboury.[4] Persisting, Sanders asked her if she'd like a transfer into customer service, and Dorff again said no. When Sanders continued to talk about the Union, Dorff asked if she could return to work. He agreed and the meeting ended at that point.[5]

Sanders' unqualified request that Dorff cease talking about the Union violates her Section 7 rights. *Fiber Glass Systems*, supra. And his questioning concerning her union activities was not casual or innocuous. He was the top management official in charge of personnel matters for CVN's complement of 3600 employees and he called her to his office specifically to induce her to desist from those activities. His interrogation, therefore, was plainly coercive, as was his attempt to achieve her acquiescence by implied promises of favorable personnel actions, i.e., reassignment and leniency for her daughter. *Gem Urethane Corp.*, 284 NLRB 1349, 1363 (1987). Sanders, however, does not appear also to have threatened unspecified reprisals, as alleged in the complaint.

On or about February 2 Dorff again was called from her workstation and told to go to Sanders' office.[6] The subject was a conversation she had on the previous day in the cafeteria with two women employees. The latter identified themselves as managers when Dorff began to talk to them about the Union, and they invited her to explain why a union was needed. In doing so Dorff claimed that the Union could protect employees from unjust firings. Asked to be more specific she said that her daughter and other employees had been terminated unfairly and without cause, and she claimed that her daughter had been fired to deny benefits.[7]

In the office she met Sanders and another top official of CVN (Reuel Nygaard), its vice president of corporate operations. Sanders informed her that the women managers had reported her conversation in the cafeteria and that he and Nygaard were disturbed that she was making ''untrue and slanderous'' assertions that employees had been terminated unjustly.[8] They interrogated her for 30 to 45 minutes. According to Nygaard, Dorff didn't explain her statements at the meeting. Neither Nygaard nor Sanders deny that during the session Sanders slammed his fist on the desk saying: ''Mavis, I will not hear . . . any more of these untruths. I will not tolerate it . . . If you don't stop telling these lies, we may have to let you go.'' The meeting ended when Dorff asked to be allowed to go back to work. I credit Dorff's account.

The law is clear that false utterances and writings made by union supporters during the course of an organizing drive and in furtherance of that drive constitute union or protected activity within the meaning of Section 7 of the Act unless they are made maliciously and with knowledge of their falsity. *Owings-Corning Fiberglass Corp. v. NLRB*, 407 F.2d 1357 (4th Cir. 1969), *American Cast Iron Pipe Co.*, 234 NLRB 1126, 1131 (1978); *Walls Mfg.*, 137 NLRB 1319 (1962). And the burden of showing that the statements were knowingly false and therefore malicious is on an employer who seeks to prevent dissemination. *Radisson Muehlebach Hotel*, 273 NLRB 1464 (1985).

CVN made no attempt to prove false Dorff's assertion that employees were terminated without cause. Indeed the very generality of that statement makes it virtually impossible to disprove. The situation is akin to carrying a sign on a picket line stating an employer is ''UNFAIR!'' Historically such statements are protected because an employers only practical recourse is denial or counterpropaganda.

As to Dorff's claim that her daughter was terminated for the purpose of denying her benefits, I find the statement ambiguous. It could mean, as testified by Dorff, that by being fired her daughter was denied opportunity to accrue benefits. But even if an inference is taken that her termination was intended to deny earned benefits, CVN made no attempt to establish other reasons for the discharge.

In these circumstances I find the lengthy interrogation of Dorff by the two senior officials of CVN, accompanied by desk pounding by one, to have been unjustified, intimidating, and therefore unlawful. Further, their threat to fire her if she repeated the statements in question constitutes an unlawful infringement on her right to recruit employees for the Union. *Fiber Glass Systems*, supra.

A few days later Dorff was again called to the small office on the sales floor. When she arrived Manager Gaboury spoke to her briefly about her attendance record and asked if she felt her absences were excessive. Dorff responded that overall and compared to her coworkers she did not. Then he asked if she had everything settled with Nygaard and Sanders. When Dorff said yes, Gaboury asked if he could feel assured that she would not be talking about the Union anymore. Dorff replied that she would continue to talk about it at proper times and places. It is obvious that Gaboury was aware of the earlier session with Nygaard and Sanders and that he knew or assumed they had urged her to cease talking about the Union. And by asking if he could ''feel assured'' in the regard he was again telling her that he wanted her to stop. The interrogation, therefore, was coercive and unlawful. But, without more, it did not entail threats of unspecified reprisals as alleged in the complaint.

[4] In evaluating Dorff's credibility I am aware that in letters sent to top CVN officials between March 10 and April 4, 1989, she accused Gaboury and Sanders of pursuing a ''vendetta'' against her family, and that she initially denied that fact at the trial. Nevertheless, I have concluded that her testimony as to pertinent events described here is substantially accurate.

[5] Sanders testified that he couldn't recall having a one-on-one meeting with Dorff around January 9, thereby impliedly denying the statements attributed to him by Dorff. He checked his appointment book prior to the hearing and found no entry regarding Dorff. Assertedly, he habitually listed appointments.

[6] Sanders states that the meeting occurred on ''approximately January 31st or February 1st or 2nd.''

[7] In response to a question, ''And did she say anything to you about benefits?,'' one of the women managers (Sharon Dawson) replied: ''She said that her daughter was terminated, I think she said a week before her benefits were supposed to go into effect.'' And in response to a followup question: ''Did she indicate that that was done to deny her daughter the benefits?,'' Dawson answered, ''She inferred that.'' In light of the leading nature of the questions, Dawson's qualified reply, ''I think she said . . .'' and Dorff's denial of ever having said her daughter had been ''cheated'' out of benefits (Tr. 66 and 81), I decline to find that Dorff said that her daughter was terminated for the purpose of denying benefits already earned or about to vest.

[8] In its employee handbook CVN advises all personnel that it has the right to terminate the employment relationship at any time without notice, for any reason or for no reason at all.

II. VIOLATION OF SECTION 8(A)(3)

As noted, Dorff was an open, outspoken supporter of the union organizational effort from January 3 until she left CVN on medical leave on February 10.

For its part, CVN promptly, after receiving the Union's letter of intent to organize, began an antiunion campaign. That effort included distributing literature to employees through their direct supervisors and requiring employee attendance at meetings where CVN's opposition to unionization was made known. And, as found, top managerial personnel repeatedly attempted to coerce Dorff in her exercise of Section 7 rights.

At the end of her shift in early January, Dorff punched out on a timeclock near her workstation. As she walked down a staircase leading to an exit she met a janitorial employee (Sherry). As they passed Sherry greeted Dorff and asked how she was doing. Dorff replied: ''Fine.'' At that moment Dorff's leadman (Quentin Kelly, an admitted supervisor) ran up the stairs and asked Dorff why she was loitering.[9] When she protested that all she had done was to say ''Hello,'' he hurriedly said: ''Well, you can't do that. You have to leave now. Right this minute.'' He also told her he'd figure out a way to make sure she left promptly in the future.

When she arrived at her workstation on the following day, Kelly reminded her of the encounter on the stairs and said: ''I don't want you to be talking to anybody. You punch out and you leave right away.'' And later in the day he conveyed additional instructions, telling her that henceforth she was to obtain a signed receipt from a security guard each time she exited the building showing the exact time she left. Dorff complied; and until Kelly was transferred in late January she took the guards' notations to him about once a week. Then, after jotting down the exit time entries for comparison with her punch out times, he returned most of the notes to Dorff.[10]

No other employee was required to undergo an exit time verification process; and in view of managements awareness of her active support of the Union, I conclude that the disparate treatment was intended to deter and discourage her from pursuing such activities. This constitutes unlawful discrimination within the meaning of Section 8(a)(3) and (1) of the Act.

[9] A few days earlier Kelly, having noticed her union buttons, asked Dorff if she ''was one of those union people.'' She said ''yes.''

[10] Kelly denies ever mentioning the Union to Dorff. He allows, however, that on one occasion in early January she ''might'' have mentioned it, but he claims he then promptly cut her off by telling her he didn't ''want to talk about the subject at all.'' He admits confronting Dorff on the stairs but denies having asked her to sign out with the guards or ever having seen notations of guards concerning Dorff's exit times. As to the latter, he recalls that at one time Dorff tried to show him something stating ''This is what time I left,'' and that he declined to take or look at the document and instead told her that she just needed to leave the building before midnight. As between his account and that of Dorff, I credit the latter. And in this instance my assessment is bolstered by examples in evidence of guard notations verifying her exit times. I find it hard to believe that she would have pursued the verification procedure day after day without having been told to do so.

CONCLUSION OF LAW

I find that Respondent CVN violated the Act in the manner and for the reasons stated above.

Disposition

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, CVN Companies, Inc., Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees concerning their or other employees' union activities or sympathies.

(b) Prohibiting employees from discussing unionization during nonwork times.

(c) Interfering with employee distribution of union literature in nonwork areas.

(d) Creating an impression that employee discussions of matters relating to unionization were under surveillance.

(e) Promising or offering benefits in return for employees ceasing to voice support for unionization.

(f) Imposing discriminatory sign-out requirements on employees for the purpose of preventing employees from engaging in union or other protected activities.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Minneapolis, Minnesota, copies of the attached notice marked ''Appendix.''[12] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''